United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

77-1045

To be argued by
JOHN NICHOLAS IANNUZZI

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1045

UNITED STATES OF AMERICA,
Appellee,

—v.—

LOUIS CIRILLO,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S REPLY BRIEF

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United States Court of Appeals

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UNITED STATES OF AMERICA,

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Appellant.

APPELLANT'S REPLY BRIEF

POINT I

Jurisdiction To Enhance The Sentence Herein Never Existed; and, As A Matter of Law, Such Non-Existent Jurisdiction Could Not Be Created By Modification, Amendment, Waiver Or Consent.

The government, in its brief, has attempted partially to support its position that the sentence herein was properly enhanced—as the Court below attempted partially to support its decision to the same effect—on the basis that the prosecutor, at sentence, requested a *nunc pro tunc* correction of the record concerning the filing of the Information; and that the Court, without objection by defense counsel, did, in fact, make such correction.

The reliance by the government and the Court below is both factually and legally erroneous.

The prosecutor at sentence indicated to the court that there was a transposition of dates appearing on the docket sheet which did not agree with the date of filing of the Information. The prosecutor asked only that the docket sheet be corrected *nunc pro tunc* to agree with the said date of filing of the Information:

> "Mr. Seymour: In connection with the copy of the information I am handing up to your Honor, there is one clerical error in the docket sheet downstairs that I would like to ask be corrected *nunc pro tunc* on the order. This information was in fact filed on April 12th. The docket sheet has the date transposed as being April 21st, which would make it actually after the commencement of the trial and is an error. I would like to ask your Honor to direct that the docket be corrected to show the proper date" (A. 13).

Inasmuch as the date recorded on the docket sheet and the date of filing stamped on the Information did then, and continue now, to coincide exactly (compare A. 34 and A. 37), the prosecutor's representation to the court as to a clerical transposition was patently inaccurate and such attempted correction of the docket sheet was meaningless.[1] Indeed, as the docket sheet is merely a convenient central summary of matters contained elsewhere in the court file of an indictment, its modification alone carries no legal significance whatever.

Significantly, the prosecutor never requested a correction or change in the date of filing stamped on the actual Information itself![2]

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[1] Indeed, nowhere in the record of this case is there reflected any correction of the filing date of the Information, nor did the sentencing court expressly authorize such a correction (see A. 13-A. 14).

[2] Apparently, the Information containing the actual April 21, 1972 filing stamp date was not before the court, prosecutor, or defense counsel at the time of sentence.

Moreover, defense counsel merely stated that he had received (been served with) a copy of the Information "some time ago". Assuming, *arguendo*, that such service did, in fact, take place prior to trial, such service merely satisfied the lesser *service* mandate of 21 U.S.C. § 851, and in no fashion satisfied the *sine qua non* mandate, the jurisdiction—conferring *timely filing* of the Information with the court.

Without such timely filing, regardless of service on counsel, or on the petitioner himself, jurisdiction to enhance the sentence was and is non-existent.

> "* * * strict compliance by the Government with the statutory filing requirements is a prerequisite for an enhanced sentence." *United States* v. *Noland*, 495 F.2d 529, 530 (5th Cir. 1974), *cert. denied*, 419 U.S. 966 (1974).
>
> * * * * *
>
> "* * * a failure by the Government strictly to comply with § 851 (a) (1)'s requirement of service of the information of previous conviction does deprive the District Court of jurisdiction to impose an enhanced sentence, ***." *United States* v. *Cevallos*, 538 F.2d 1122, 1125 (5th Cir. 1976), citing *Noland, supra.*

It is, of course, axiomatic, that when there is a legal void, such as the instant failure of jurisdiction, the void cannot have life breathed into it, any more than a still-born fetus can have life breathed into it. When there is a legal void, validity has not ceased; rather, it has never came into existence. Life, legal or otherwise, in such a non-entity, cannot be amended, altered, modified, consented to, or otherwise affected so as to vary its condition. It has no existence; it never had any existence. See, *e.g.*, *Pennoyer* v. *Neff*, 95 U.S. 714, 728 (1877) ("The judgment, if void when rendered, will always remain void").

This legal concept of voidness is universally accepted in diverse areas of law. Black's Law Dictionary (Rev. 4th ed. 1968), p. 1745, defines "void" as:

> "Null, ineffectual, nugatory; having no legal force or binding effect; unable, in law, to support the purpose for which it was intended."
>
> * * * * *
>
> "There is this difference between the two words 'void' and 'voidable': void in the strict sense, means that an instrument or transaction is nugatory and ineffectual so that nothing can cure it."
>
> *Allis* v. *Billings*, 6 Metc. Mass, 45, 39 Am. Dec. 744
>
> * * * * *
>
> "The word 'void' is used in the statutes in the sense of utterly void so as to be incapable of ratification ***"
>
> *United States* v. *New York & Puerto Rico S.S. Co.*, 239 U.S. 88 (1915)
>
> * * * * *
>
> "A void contract is one which never had any legal existence or effect and such contract cannot in any manner have life breathed into it."
>
> *National Union Indemnity Co.* v. *Bruce Bros., Inc.*, 44 Ariz. 454, 38 P.2d 648, 652

Thus, when the government, as here, urges that the court below corrected the untimely filing date *nunc pro tunc*, the government is erroneously ascribing a power beyond the jurisdiction of the court below.

It is, of course, most significanct, that the court below did not find, did not mention nor did the government produce, nor, most respectfully, shall this Court be able

to glean from the record, one whit of evidence that the information was filed on any date other than April 21, 1972 (See Point III, *infra.*)

POINT II

The Jurisdiction-Less Enhancement Of Sentence Herein Can In No Fashion Be Considered Insubstantial or Harmless To Appellant.

The government's suggestion that the substantial enhancement of sentence herein is a trifling matter, of no significance, which amounts to a mere technical error, runs full tilt into the incisive logic of the very cases cited by the government in its brief.

In the *Cevallos* case, *supra.*, at page 1125, the Court there determined unequivocally that without the timely filing of an Information pursuant to 21 U.S.C. § 851, a court is totally without jurisdiction to enhance a sentence, and indeed any such enhancement of sentence would be *illegal*, not merely pronounced in an illegal manner.

In *Hill* v. *United States*, 368 U.S. 424 (1961) and other cases cited and relied upon by the government, the Supreme Court held that mere insignificant technical error, which does not affect basic or subtantial rights, is not reviewable under a Rule 35 attack. Obviously, the Supreme Court logic holds the converse true; significant errors which affect basic and substantial rights are certainly reviewable under Rule 35 attack.[3]

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[3] Petitioner moved pursuant to 28 U.S.C. § 2255 as well as Rule 35.

An enhancement of sentence from 15 to 25 years in jail, where no jurisdiction to so enhance existed, is an illegal loss of liberty which in no fashion can be, or ever has been, considered insubstantial and harmless.

The government's main (and futile) Rule 35 attack on the solid fortress of jurisdictionless enhancement serves to underscore the strength of petitioner's position that, indeed, factually, the jurisdiction to enhance was non-existent herein, that not one document, not one witness testified or supports that timely filing which the government urges to this court (See Point III, infra.)

POINT III

Not A Scintilla Of Proof At The Hearing Below Supports The Filing Of The Information On Any Day Other Than Untimely April 21, 1972.

The government's brief supports wholeheartedly "the District Court conclusion that the Information was filed April 12, 1972" (p. 14), basing its support on the following hopelessly vague, sweeping generalities:

> "Judge Weinfeld's specific findings";
> "ample evidence to support [the] conclusion;
> "the evidence amply supported [the] finding";
> "there was more than enough evidence presented at the hearing to overcome any presumption of regularity".

Petitioner challenges the government to point out at the argument of this appeal one specific iota of proof—other than the unaccounted and unaccountable remark of the prosecutor at sentencing—that the Information was filed April 12, 1972.

Indeed, petitioner challenges the government to point out any specific iota of proof that the Information was filed any day other than April 21, 1972.

The government virtually scoffs at hearing witnesses Aponte and Dean [official court clerks], and Kowalski [a U.S. Attorney's clerk, *called by the government*] all of whom testified without contradiction at the hearing that the Information was filed April 21, 1972, "since none of these witnesses had any personal knowledge of the events and could only refer to the date stamped on the document" (Br. 15).

Reading the testimony of the witnesses on whom the government hopes desperately to rely, these witnesses had no personal knowledge of the filing of the Information either—and they do not even have documents upon which to rely. It is for precisely such failures of recollection that the presumption of regularity has been attached to official court records, and should prevail here.

CONCLUSION

The decision and order below should be vacated, a finding entered that the Second Offender Information was untimely filed, and the matter remanded for resentencing in light thereof.

Respectfully submitted,

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